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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DEMOND RUSSELL,

Defendant and Appellant.

F063101

(Super. Ct. No. BF134357B)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Charles R. Brehmer, Judge.

Eric Weaver, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna, and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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Michael Russell committed multiple crimes with his cousins, Stephan Cartwright and Sidney Maiden. Following a trial severed from that of his relatives, a jury found Russell guilty of two counts of attempted first degree robbery (Pen. Code § 664/§ 212.5,

subd. (b));¹ three counts of assault with a deadly weapon (§ 245, subd. (b)); two counts of second degree robbery (§ 212.5, subd. (c)); one count of possession of a firearm by a convicted felon (§ 12021, subd. (a)(1)); and one count of active participation in a criminal street gang (§ 186.22, subd. (a)). The jury also found true enhancement allegations that Russell personally used a firearm during the second degree robbery and gang participation offenses (§ 12022.5, subd. (a); § 12022.53, subd. (b)), and that he acted for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)). Russell was sentenced to a total prison term of 38 years and eight months.

Russell raises two issues on appeal. He challenges the trial court's denial of his request to display tattoos on his arms to the jury, a request made following police testimony which described the tattoos as being red in color, apparently suggesting affiliation with the Bloods street gang. The court ruled that such a display would be testimonial for purposes of the Fifth Amendment and impermissible unless Russell subjected himself to cross-examination. Russell claims this was reversible error.

Russell also challenges the convictions and findings related to his personal use of a firearm. He asserts the jury's verdict was based on "physically impossible" and/or "inherently improbable" eyewitness testimony. These arguments flow from the contention made at trial, and again on appeal, that Russell's left arm is paralyzed.

While we agree that the ruling which prohibited Russell from displaying his tattoos to the jury was erroneous, the error did not affect the verdict and was therefore harmless. Furthermore, the record discloses substantial evidence to support the jury's true findings concerning the gang allegations and his personal use of a firearm. We affirm the judgment.

¹ Undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

On the night of October 27, 2010, Sidney Maiden picked up his cousins Stephan Cartwright and Russell in a stolen green minivan. They travelled to a bank on Oswell Street in Bakersfield where they attempted to rob two people at a drive-through automated teller machine. Next they went to La Mina Restaurant, located nearby on Auburn Street, where two of the men accosted Marilyn Aldana and Laura Sanchez in the parking lot and stole their purses at gunpoint.

Ms. Sanchez called 911 to report the robbery. She described the perpetrators as black males driving in a green van, one of whom was wearing a red shirt.

Russell and Stephan Cartwright were apprehended a few hours later at the home of Russell's sister. Sidney Maiden was arrested at a separate location. Police searched Russell's sister's residence and found a semi-automatic handgun, as well as personal property belonging to Ms. Aldana and Ms. Sanchez. Ms. Aldana and Ms. Sanchez subsequently identified Russell from a police line-up as one of the men who had robbed them.

Russell was wearing a red shirt at the time of his arrest. While in custody, he waived his *Miranda*² rights and participated in a police interview that was recorded by an investigating officer, Nicole Shihrer. Russell admitted being present during the robbery at La Mina Restaurant and confirmed he had been wearing the same red clothing. He acknowledged that Stephan Cartwright and Sidney Maiden were members of the Bloods street gang, but denied being a member himself.

At trial, the prosecution's case-in-chief included testimony by five eyewitnesses, two investigating officers from the Bakersfield Police Department, and a police expert on criminal street gangs. Officer Shihrer authenticated the audio recording of Russell's police interview which was played for the jury in its entirety.

² *Miranda v. Arizona* (1966) 384 U.S. 436.

Officer Shihrer testified regarding Russell's physical appearance and clothing on the night of his arrest. Russell was the only one of the suspects arrested wearing a red shirt. She also testified that Russell had "bright red" tattoos of the words "royalty" and "loyalty" on his forearms.

During the examination of Officer Shihrer, defense counsel requested that Russell be allowed to "uncover his arms and show the jury his tattoos." The trial court ruled that such a display would be testimonial, subjecting Russell to cross-examination. The court invited defense counsel to instead provide the jury with photographs of the tattoos. Multiple photographs of Russell's tattoos were admitted into evidence during the defense case-in-chief.

The prosecution's gang expert was Bakersfield Police Officer Travis Harless. Officer Harless testified that the Bloods are a street gang engaged in an ongoing pattern of criminal conduct in Bakersfield. He described the gang's primary activities as including "theft-related crimes such as burglary, auto theft, carjacking [and] robbery," and explained that Bloods identify with the color red.

Officer Harless obtained background information about Russell through the Criminal Justice Information System. Officer Harless testified at length regarding his review of booking information and police reports from more than fifteen different investigations and arrests for theft-related crimes involving Russell. In several instances, Russell had been wearing red clothing and/or associating with known gang members.

Based upon his criminal history and prior admissions of gang affiliation, Officer Harless opined that Russell was a member of the Bloods street gang. His red tattoos and frequent choice of red clothing "strengthened" Officer Harless's opinion. Officer Harless likewise opined that Stephan Cartwright and Sidney Maiden were Bloods members.

Concerning the robberies at La Mina Restaurant, victims Marilyn Aldana and Laura Sanchez identified Russell in court as the gunman. On cross-examination, both women testified that Russell pointed a gun at them with his right hand while using his left

hand to take their purses. The defense later argued that this scenario was impossible because Russell is physically incapable of moving his left arm.

Russell's aunt, Ethel Mae Rincon, testified as a defense witness. According to Ms. Rincon, Russell had been in a car accident several years ago which caused his left arm to become paralyzed. She denied having any knowledge of Russell's involvement in gang related activities and said she did not believe he was a member of the Bloods.

DISCUSSION

I. Gang Findings Under Section 186.22

Russell contends the gang participation conviction and enhancement findings must be reversed because he was prohibited from showing the jury his tattoos. We disagree. The trial court's erroneous ruling did not affect the jury's verdict.

A. The Proposed Display of Russell's Tattoos Was Not Testimonial

The Fifth Amendment to the United States Constitution guarantees the privilege against self-incrimination. It precludes the state from compelling a person to provide "testimonial evidence" that would incriminate them in a criminal case. (*People v. Gastello* (2010) 49 Cal.4th 395, 403.) Evidence is testimonial if it involves a communication which conveys factual assertions by the accused or discloses information in the form of the defendant's personal knowledge or subjective beliefs. (*People v. Low* (2010) 49 Cal.4th 372, 390.) When the accused proffers such evidence voluntarily, the privilege is waived for those matters upon which he or she testifies and the defendant is subject to cross-examination within the scope of the waiver. (*Mitchell v. United States* (1999) 526 U.S. 314, 321-322.)

The compelled display of identifiable physical characteristics does not infringe upon the right against self-incrimination. (*United States v. Dionisio* (1973) 410 U.S. 1, 5-6; see also, *People v. Roberts* (1975) 51 Cal.App. 3d 125, 140 ["The Fifth Amendment protects communicative or testimonial evidence, but does not embrace the use of the suspect's body as a source of physical evidence."].) This is why a defendant's voluntary

display of his own tattoos does not implicate Fifth Amendment privileges. “[T]he desire of the defendant to show a scar, tattoo, gold tooth or other relevant physical characteristic without accompanying testimony (or concomitant cross examination) is merely the other side of the coin to the prosecution’s right in both federal and California state courts to compel the relevant exhibition of such a physical characteristic without impinging a defendant’s privilege against self-incrimination.” (*People v. Perez* (1989) 216 Cal.App.3d 1346, 1352.)

Respondent agrees that Russell’s tattoos were not testimonial evidence, but claims the trial court exercised discretion under Evidence Code section 352 when it prohibited live exhibition of the tattoos. The record does not support this argument. There is nothing to suggest that the trial court perceived a risk of unfair prejudice, undue consumption of time, confusing of the issues, or misleading the jury.

The only reason the trial court gave for denying Russell’s request was that displaying his tattoos would be testimonial. When a trial court’s ruling is based on an error of law, the ruling is an abuse of discretion. (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 746; *People v. Cooper* (2007) 148 Cal.App.4th 731, 742.) Therefore, Russell has correctly identified error in the proceedings below.

B. The Trial Court’s Error Was Harmless

1. Standard of Review

“The improper exclusion of evidence is subject to a harmless error analysis.” (*People v. McDowell* (2012) 54 Cal.4th 395, 434.) If such exclusion does not infringe upon a defendant’s constitutional rights, the error is reviewed under the standard of prejudice adopted in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103 (*Fudge*).) Under *Watson*, a defendant must show it is reasonably probable that a more favorable result would have been obtained but for the error. (*People v. Mena* (2012) 54 Cal.4th 146, 162, citing *Watson, supra*, at p. 836.)

Errors of a constitutional dimension are evaluated under the standard established in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (*Fudge, supra*, 7 Cal.4th at p. 1103.) The *Chapman* test requires the reviewing court to determine “whether it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”” (*People v. Gonzalez* (2012) 54 Cal.4th 643, 663.) Undermining a criminal defendant’s right not to testify, as Russell alleges in this case, may rise to the level of constitutional error. (See *People v. Lawson* (2005) 131 Cal.App.4th 1242, 1249, fn. 7; *People v. Cuccia* (2002) 97 Cal.App.4th 785, 791.) We need not decide whether the *Chapman* or *Watson* standard applies in this instance because the denial of Russell’s proposed exhibition of his tattoos was harmless under either standard.

2. The Gang Findings Were Supported By Substantial Evidence Apart From Any Consideration of the Tattoos.

Russell submits that the jury’s gang findings resulted “directly from the erroneous refusal to let him display his tattoos.” He reasons that without testimony about the color of his tattoos (and his presumed ability to refute such testimony), the jury would have (1) rejected the notion that he was a member of the Bloods street gang and (2) concluded that the underlying crimes were not gang related, but merely committed by “a group of outlaw cousins.” These arguments are not persuasive.

(a) The Substantive Gang Offense (§ 186.22, subd. (a))

Section 186.22 contains a substantive offense which punishes “[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang” (§ 186.22, subd. (a).) The elements of the offense are: “First, active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; second, knowledge that the gang’s members engage in or have engaged in a pattern of criminal gang activity; and third, the willful promotion, furtherance, or assistance in any

felonious criminal conduct by members of that gang.” (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130 (*Rodriguez*).)

The second element is not in dispute. The prosecution’s gang expert provided ample testimony regarding the existence of the Bloods street gang and typical patterns of criminal activity by its members, including the crimes at issue. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 609 [expert testimony is relevant and admissible to prove the elements of substantive gang crimes and gang enhancements].) Russell likewise admitted his familiarity with the Bloods gang during his police interview.

With regard to the first and third elements, Russell insists he has never been a gang member and that the evidence at trial did not prove otherwise. Membership, however, is not a required element of active participation in a criminal street gang. (§ 186.22, subd. (i); *In re Lincoln J.* (1990) 223 Cal.App.3d 322, 330, fn. 4.) Active participation refers to behavior that goes beyond nominal or passive involvement with a gang. (*People v. Castaneda* (2000) 23 Cal.4th 743, 747 (*Castaneda*).)

The first element can be established through evidence of crimes committed with other gang members, historical contacts with a particular gang, and admissions of gang association. (See, e.g., *Castaneda, supra*, 23 Cal.4th at p. 753.) The prosecution’s gang expert based his opinions on all of these factors, and also considered Russell’s affinity for red clothing, which he wore while committing the concurrently charged felonies. Russell admitted that his cousins were Bloods and spoke to police about his associations with them and other members of the gang.

The third element requires that the defendant willfully advance, encourage, contribute to, or assist in felonious criminal conduct by gang members. (*Rodriguez, supra*, 55 Cal.4th at p. 1132.) Russell does not challenge his felony convictions for second degree robbery and attempted first degree robbery. These crimes were committed with two acknowledged members of the Bloods street gang, Stephan Cartwright and Sidney Maiden.

Notwithstanding the convictions, Russell's statements to police supported the inference that he willfully aided and abetted felonious conduct by gang members. He acknowledged being present during the robbery at La Mina Restaurant, circling the parking lot and "scoping it out." The jury could have fairly interpreted this as an admission of reconnoitering and/or standing watch for his cousins. Russell also made incriminating statements regarding property which the gang members stole from their victims: "I just want to know what they gypped me out of[,] 'cuz I didn't get no money."

The foregoing evidence established each element of the substantive gang offense. The evidence was substantial, i.e., reasonable, credible, and of solid value from which a reasonable trier of fact could find Russell guilty beyond a reasonable doubt. (*People v. Albillar* (2010) 51 Cal.4th 47, 54, 59-60 (*Albillar*) [substantial evidence standard applies to gang offenses and enhancements under section 186.22].) The additional tattoo evidence was not essential to the jury's verdict.

(b) The Gang Enhancement Findings (§ 186.22, subd. (b)(1))

The gang enhancement is defined in section 186.22, subdivision (b), which provides for increased punishments if two elements are present. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 (*Villalobos*).) The prosecution must establish the underlying crime was "[1] committed for the benefit of, at the direction of, *or in association with* any criminal street gang, [2] with the specific intent to promote, further, or assist in any criminal conduct by gang members...." (§ 186.22, subd. (b)(1), italics added.) As with the substantive offense under subdivision (a), membership in a gang is not required. (*Albillar, supra*, 51 Cal.4th at pp. 67-68.)

Russell was associating with gang members when he committed the predicate offenses in this case. In light of the expert witness testimony and surrounding circumstances, including Russell's red clothing, it was rational for the jury to conclude that the crimes were gang related. (See *People v. Morales* (2003) 112 Cal.App.4th 1176, 1179, 1198 [evidence defendant knowingly committed the charged crimes with two gang

members was sufficient to support the jury's true findings under section 186.22, subd. (b)(1)].) This conclusion is not invalidated simply because the gang members also happened to be Russell's relatives.

For the second prong of the enhancement, the jury needed to look no further than the underlying robbery offense for which Russell was convicted. "Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime." (*Villalobos, supra*, 145 Cal.App.4th at p. 322.) Russell's commission of the predicate offenses in concert with known gang members was established by the time the jury considered the gang enhancement allegations. Evidence of Russell's red tattoos may have been relevant to those allegations, but was superfluous.

3. Prohibiting Live Exhibition of Russell's Tattoos Did Not Affect the Jury's Verdict.

In arguing for reversal, Russell likens this case to *United States v. Bay* (9th Cir. 1984) 762 F.2d 1314 (*Bay*). There, the defendant wanted to show the jury certain "conspicuous tattoos" on his hands to argue that the failure of prosecution witnesses to notice or mention the tattoos during their testimony raised a reasonable doubt about their identifications of him as the perpetrator. (*Id.*, at p. 1315.) The trial court ruled that such an exhibition would require the defendant to submit to cross-examination. The Ninth Circuit reversed and remanded, holding that the tattoos were not testimonial evidence and, with proper foundation, would be admissible without requiring the defendant to take the witness stand. (*Id.* at pp. 1315-1316.)

This case is distinguishable from *Bay* in several respects. The *Bay* defendant's tattoos were "potentially exculpatory" given that eyewitness identification testimony was the only evidence supporting two of the charges against him. (*Bay, supra*, 762 F.2d at p. 1316.) Here, Russell's tattoos were not germane to the victims' identification of him and

represented a small component of the larger body of evidence offered in support of the gang allegations.

More importantly, the record does not indicate that a live display of Russell's tattoos would have had any exculpatory value. We reject his assertion that the color of his tattoos was a "highly disputed issue" at trial. Defense counsel never denied that Russell's tattoos were red, nor did he dispute the accuracy of police testimony on that subject. The defense attorney's objection during the examination of Officer Shihrer was made on grounds that "if [the officer] hasn't seen those tattoos, her testimony is hearsay and ... should be stricken..."³

Further, Russell's ability to present evidence of his tattoos was not entirely contingent upon a waiver of his Fifth Amendment right not to testify. (See *Bay, supra*, 762 F.2d at p. 1316.) The trial court allowed him to submit photographs of the tattoos in lieu of a live exhibition. The prosecution had already photographed the tattoos at the beginning of trial and the defense attorney had an opportunity to take any additional pictures he wished to present to the jury.

Defense counsel introduced fourteen photographs of Russell's various tattoos into evidence. At least six of those photographs showed his left and right forearms from different angles and included "close up" images of the tattoos in question. The defense did not comment on these photographs to the jury and neither party made any mention of the tattoos during their respective closing arguments. Under these facts and circumstances, Russell's ability to submit photographic evidence of his tattoos served as an adequate substitute for a live, in-court exhibition. It cannot be said that the trial court's denial of Russell's request for the latter had a material impact on the verdict under

³ There was no merit to this objection. Officer Shihrer testified that she had seen Russell's tattoos and thus had personal knowledge of their appearance. Her testimony was not offered for the truth of any matter asserted by the tattoos themselves, i.e., the words "royalty" and "loyalty." (See Evid. Code § 1200, subd. (a).)

any standard of prejudice. (*Watson, supra*, 46 Cal.2d at p. 836; *Chapman, supra*, 386 U.S. at p. 24.)

II. Personal Use of Firearm Enhancements (§§ 12022.5, subd. (a); 12022.53, subd. (b))

The jury found true enhancement allegations that Russell personally used a firearm within the meaning of sections 12022.5, subdivision (a) and 12022.53, subdivision (b). These findings were based on the testimony of Marilyn Aldana and Laura Sanchez, i.e., the women who were robbed in the parking lot of La Mina Restaurant. Citing the alleged paralysis of his left arm, Russell insists that the testimony of both victims was physically impossible and/or inherently improbable. Assuming that his left arm was in fact paralyzed, we conclude that the doctrines of physical impossibility and inherent improbability do not apply. Regardless of how this court might interpret the evidence, the jury's verdict must be affirmed under the controlling standard of review.

1. Relevant Trial Testimony and Evidence

Marilyn Aldana testified on direct examination that she and Laura Sanchez were accosted by two males in the parking lot of La Mina Restaurant. As she was sitting in her car, one of the men leaned in through the open passenger door window and pointed a gun at her. The gunman demanded that she give him her purse. She complied by handing the purse over to him.

Ms. Aldana recalled that the gunman was wearing a red shirt underneath what appeared to be a blue sweater. When asked about the gunman's accomplice, the witness testified that she "really couldn't see him very well." A few hours later, after the suspects were arrested, Ms. Aldana identified Russell from a police line-up. At trial, she identified Russell in the courtroom as the man who had robbed her at gunpoint: "He was the guy with the gun."

Ms. Aldana was questioned on cross-examination about certain details of the robbery. She could not recall which hand Russell had used to hold the gun. Defense counsel then asked her to confirm the following sequence of events:

“Q. Okay. So he’s holding the gun; right? Yes?

“A. Yes.

“Q. And then you hand him the purse? Yes?

“A. Yes.

“Q. And he grabbed it?

“A. Yes.

“Q. With his other hand, because he’s holding a gun in one hand; right?

“A. Right.”

Later, at his attorney’s direction, Russell performed a physical demonstration which suggested he was incapable of moving his left arm. Following this demonstration, Ms. Aldana was again asked to confirm that Russell had used two hands during the robbery; one to hold the gun and the other to grab the purse. Ms. Aldana stated that she did not recall one way or the other. As defense counsel pressed the issue, she repeatedly testified that she could not remember those details.

At one point, Ms. Aldana explained: “I can’t state what hand – what hand he did have the gun in, but I do know that he had the gun in the car pointed at me, asking me to give him my purse.... It took me a while to kind of just comprehend what was happening, until I did decide to hand him my purse. I can’t say he reached in with two hands. I just know I handed [him] the purse. He could have grabbed it with one hand or two hands.” Defense counsel persisted with the same line of questioning until the following exchange took place:

“Q. And now you’re under oath; right?

“A. Yes.

“Q. Okay. Now, the man who pointed the gun at you that night pointed the gun with one hand; is that right?

“A. Yes.

“Q. And then you handed him the purse, and he grabbed it with the other.

“A. (Pause in the proceedings.) I want to say yes.

“Q. No further questions of this witness.”

Laura Sanchez was exiting her vehicle when two males ran up from behind her in the restaurant parking lot. One of the men pointed a gun in her face, touching it to her chin, and demanded that she give him her purse. Ms. Sanchez handed her purse over and watched as the gunman proceeded to rob Marilyn Aldana in the same fashion. She confirmed that the man with the gun committed both robberies while his accomplice stood nearby.

Ms. Sanchez testified that both men had been wearing blue sweaters or “hoodies” and that she recalled seeing a red shirt. She noted, however, that she did not have a clear recollection of what the men were wearing because seven months had passed since the robbery. As with Marilyn Aldana, Ms. Sanchez had previously identified Russell during a police line-up.

At trial, Ms. Sanchez identified Russell in court as the man who had robbed her. She specifically identified him as the gunman. When the prosecutor asked, “Why do you say that?” she replied, “His face. I remember his face when he approached me.”

Defense counsel cross-examined Laura Sanchez with a series of questions similar to those asked of Marilyn Aldana. The relevant exchange went as follows:

“Q. All right. All right. Now, at some point you handed him your purse; correct?

“A. Yes.

“Q. Now, so he’s holding the gun in one hand, and then did you toss the purse to him?

“A. No. I handed it to him.

“Q. So – So he’s holding the gun, and then you hand him the purse; is that right?

“A. Yes.

“Q. With – and he grabbed it with the other hand; right?

“A. Right.”

Defense counsel moved on to other topics after eliciting the above testimony.

With regard to the perpetrators’ clothing, Ms. Sanchez testified that she believed it was the accomplice, rather than the gunman, who had been wearing a red shirt under his sweater or “hoodie.” She was then asked if she was certain it was Russell who had used a gun during the robbery. Ms. Sanchez responded: “Yeah, ‘cause I remember his side, like his face, his bone structure...Just the way he looked.”

2. Standard of Review

A jury’s findings are reviewed for substantial evidence. (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681.) “A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact *could* have relied in reaching the conclusion in question. Once such evidence is found, the substantial evidence test is satisfied. [Citation.] Even when there is a significant amount of countervailing evidence, the testimony of a single witness that satisfies the standard is sufficient to uphold the finding.” (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.)

Reversal is not warranted unless the evidence is insufficient to support the verdict under any hypothesis. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The appellate court cannot reweigh the evidence, reinterpret the evidence, or substitute its judgment for that of the jury. (*People v. Baker* (2005) 126 Cal.App.4th 463, 469.) “If the circumstances reasonably justify the jury’s findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding.” (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

3. The Jury's Findings Were Not Based Upon "Physically Impossible" or "Inherently Improbable" Testimony.

The enhancement allegations at issue are satisfied when a defendant is found to have displayed a firearm in a menacing manner during the commission of a felony, and specifically robbery under section 12022.53, subdivision (b). (§ 12022.53, subd. (a)(4); CALJIC No. 17.19; see also, *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319 [discussing § 12022.5, subd. (a)].) The robbery victims in this case testified that Russell pointed a gun at them during the commission of those crimes. If accepted as true, their testimony would constitute substantial evidence to support the enhancements.

We note first that the testimony given on direct examination by Marilyn Aldana and Laura Sanchez was not physically impossible. Even with a paralyzed left arm, Russell was capable of using his right arm to point a handgun in the manner described by both witnesses. There are also multiple scenarios in which Russell could have taken control of the victims' purses while still holding the firearm in his right hand. For example, he could have slipped his right hand and forearm through the straps of the purse as it was handed to him, or he could have grasped the straps or the purse itself with his third, fourth and/or fifth fingers while still maintaining control of the gun.

The thrust of Russell's argument is that the victims' testimony was so badly broken down on cross-examination as to render it "inherently improbable" and unworthy of belief. This is a difficult standard to satisfy. It has been said that a reversal on grounds of inherently improbable evidence is "so rare as to be almost nonexistent." (*People v. Ennis* (2010) 190 Cal.App.4th 721, 728 (*Ennis*).)

The doctrine of inherent improbability addresses the basic content of a witness's testimony. (*Ennis, supra*, 190 Cal.App.4th at p. 729.) "The only question is: Does it seem *possible* that what the witness claimed to have happened actually happened?" (*Ibid.*) The wholesale rejection of a witness's statements as inherently improbable requires "either a physical impossibility that they are true, or their falsity must be

apparent without resorting to inferences or deductions.’’’’’ (*People v. Thompson* (2010) 49 Cal.4th 79, 124.)

Russell relies on testimony given by Ms. Aldana and Ms. Sanchez on cross-examination which cannot be reconciled with the alleged paralysis of his left arm. The problem with this argument is that the jury was free to reject some parts of the witnesses’ testimony while still believing the other parts. (*People v. Langley* (1974) 41 Cal.App.3d 339, 348 [“[T]he trier of fact may reject a part of the testimony of a witness while believing other portions of his testimony.”]; see also, *People v. Jones* (1984) 155 Cal.App.3d 153, 168 [jury may believe a witness’s testimony on direct examination and reject any inconsistencies that surface on cross-examination].) “Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.” (*People v. Thornton* (1974) 11 Cal.3d 738, 754, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 685, fn. 12.)

Both witnesses were confident in their identification of Russell as the gunman because they remembered the appearance of his face. Marilyn Aldana testified that she “really couldn’t see” the other man, Russell’s accomplice, from the inside of her car. It is entirely possible that the jury was convinced by the facial recognition testimony, yet found the witnesses’ answers on cross-examination to be unreliable in terms of remembering which hand was used to grab their purses. This conclusion is strengthened by the fact that the jury was made fully aware of Russell’s alleged physical disability, as it became the focal point of the defense’s case-in-chief and closing argument.

Eyewitness identification testimony is sufficient to support a conviction unless the testimony is physically impossible or inherently improbable. (*People v. Scott* (1978) 21 Cal.3d 284, 296; *In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.) Neither exception applies in this case. The standard of review requires that the evidence most

favorable to the respondent be accepted as true and the unfavorable evidence be “discarded as not having sufficient verity to be accepted by the trier of fact.” (*In re Gustavo M.*, *supra*, 214 Cal.App.3d at p. 1497.)

Russell was identified as the gunman by two eyewitnesses. The circumstances surrounding the identification were explored at length during trial. The jury weighed the evidence and accepted the identification as true. That determination is binding on this court. (*In re Gustavo M.*, *supra*, 214 Cal.App.3d at p. 1497.)

DISPOSITION

The judgment is affirmed.

Gomes, J.

WE CONCUR:

Levy, Acting P.J.

Franson, J.